United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2109

To be argued by:
STEPHEN M. LATIMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DORIS ARMSTRONG, ET. AL.,

Plaintiffs-Appellees,

-against-

BENJAMIN WARD, ET. AL.,

Defendants-Appellants.

B

P/S

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLEES BRIEF

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ISSUES PRESENTED

I. Does the involuntary transfer of prisoners without notice or an opportunity to be heard, from one prison to another, involving a significant modification of the conditions of confinement, including among other things, uninhabitable living quarters, deprivation of statutorily mandated educational and vocational programs, and probable adverse parole consequences, violate the prisoner's Fourteenth Amendment right to not be deprived of liberty without due process of law?

II. Was the District Court's grant of summary judgment proper when appellants presented no evidentiary matter to controvert the facts established by testimony and by appellees affidavits?

STATEMENT OF THE CASE

A. Proceedings In The District Court:

On January 31, 1975, appellees filed a class action seeking to enjoin further transfers of non-mentally ill women prisoners from Bedford Hills Correctional Facility to a wing of the Matteawan State Hospital where approximately eighteen such women, including all plaintiffs except Diedre Plair, were housed.[1] The basis of the complaint was that conditions at Matteawan were so deplorable that the transfers were punitive in fact and unless appropriate hearings were held were prohibited by Newkirk v. Butler, 499 F. 2d 1314 (2nd Cir., 1974) vac. as moot sub. nom., Preiser v. Newkirk, 95 S. Ct. 2676 (1975). The defendants never interposed an answer to the complaint.

Plaintiffs also alleged, and proved, that conditions at Matteawan itself were in violation of their Eighth and Fourteenth Amendment rights. Among the most serious of these complaints was the claim that although plaintiffs and the other women at Matteawan were never committed as mentally ill, they were treated as mental patients, and were subjected to the forcible administration of long lasting psycotherapeutic drugs. Hearings on plaintiffs' motion for a preliminary injunction on this issue were conducted before Judge Knapp on February 18th, 19th, 20th and March 5, 1975. Thereafter, the State ceased that practice.

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1. Diedre Plair was an inmate of Bedford Hills, who was threatened with transfer to Matteawan.

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1. Diedre Plair was an inmate of Bedford Hills, who was threatened with transfer to Matteawan.

On April 1, 1975, at a pre-trial conference appellees announced their intention to file a motion for summary judgment within a short period of time. Shortly after the conference, the State began returning the women to Bedford Hills. On April 22, 1975, plaintiffs filed the motion for summary judgment returnable May 2, 1975 (29a), accompanied by the required statement pursuant to Local Rule 9g (31a), and affidavits of Carol Crooks (38a), Leslie Mason (48a), Doris Armstrong (53a), Margaret Leak (57a), Daisy Garcia (60a) and Theresa Durante (63a).[2] The motion was adjourned to May 15th, and again to May 30th, for the purpose of permitting appellants to submit opposing affidavits. When none were forthcoming which contained evidentiary matter, Judge Knapp, on the basis of the affidavits and prior testimony, found that (87a - 88a):

> THE COURT: I will interpret this affidavit [Fish Aff'd. (75a)] in the record as meaning that the State has concluded that it will not reopen Fishkill unless forced to do so by insufficient capacity and in that event it will not remove any prisoner, either the named plaintiffs or any other plaintiffs, from Bedford Hills to Fishkill without such prisoner's expressed concern, and that aside from prisoners going from Bedford Hills to Fishkill pursuant to such express consent the only prionsers admitted to Fishkill will be on direct committment from a Court.

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2. Numbers in parenthases refer to pages of the joint appendix.

> Now, with one week I would like an answer from the Attorney General, to wit, Mr. Lefkowitz, personally, so I will know that I am dealing with someone who has authority to affirm or deny that is the correct position. If he denies it, then, as indicated at the last hearing, I will grant a motion for summary judgment on the authority of Newkirk because I think it has been established beyond cavil that Fishkill is a less desirable place to be than Bedford Hills.
>
> I don't think your first point is well taken, that it has to be punitive. As I understand it, and the case is now on its way to the Supreme Court, the mere fact that it is less desirable requires the giving of some reason for a transfer.
>
> Therefore, I think the Court in a summary judgment prohibiting any transfer from Bedford Hills to Fishkill without a statement of reason would have to find it at this point without meeting the Newkirk-Matteawan [sic] requirements.

On June 6, 1975, Commissioner Ward submitted a response to the Court, which denied Judge Knapp's interpretation of the State's position (92a). Thereafter, on June 25, 1975, the District Court entered an order granting appellees' motion to determine the class, and for summary judgment. The relevant portions of the order provide (95a):

> 3. All transfers of named plaintiffs to Fishkill Correctional Facility between July 1, 1974 and December 31, 1974, were in violation of the transferees' right to not be deprived of liberty without due process of law;

4. Defendants are permanently enjoined from sending any member of plaintiffs' class to Fishkill Correctional Facility without following the procedures required by the decisions in Newkirk v. Butler, 2nd Cir., 1974) 499 F.2d 1214 and Haymes v. Montanye, (2nd Cir., 1974) 505 F.2d 977.

B. Statement of Undisputed and Uncontroverted Facts:

1) Chronology

Prior to July 1974, appellees were incarcerated in Bedford Hills, a general confinement facility. Between July 1, and December 31, 1974, they and others were transferred from Bedford Hills to the Matteawan/Fishkill Facility in Beacon, New York. The Fishkill Correctional Facility is a complex of hospitals and prisons which includes an institution for elderly and handicapped prisoners, and Matteawan State Hospital for the criminally insane (a facility for the custody and care of mentally and emotionally ill prisoners). Until November 27, 1974, the women inmates were housed in Building 13 in the Fishkill complex. On that date, appellees were removed from Building 13 and incarcerated in a wing of the Matteawan State Hospital building (which is represented by Exhibit "A," (65a)). Appellants admit that in no case was any woman given a hearing at which she could oppose the transfer from Bedford Hills or Building 13 (32a), or advance written notice (32a), or a written statement of the reasons for the transfer or the facts relied upon. (32a). See Appellants' Brief at 5.

After the complaint in the case at bar was filed on January 31, 1975, events moved rapidly. On April 3, 1975, all of the women except Carol Crooks, Leslie Mason and five others[3] were returned to Bedford Hills.[4] (37a, 46a, 52a, 57a). On April 7, 1975, Commissioner Ward investigated the women's unit at Matteawan and pronounced it unfit for human habitation. (46a). One day thereafter, all of the remaining women, with the exception of Carol Crooks and Leslie Mason, were retransferred to Bedford Hills. (47a, 52a, 59a, 37a). Finally, on April 27, 1975, five days after plaintiffs' motion for summary judgment was filed the last two women remaining were removed from Matteawan. Leslie Mason was transferred to Parkside Correctional Facility, a confinement facility for adult females on work release program; Carol Crooks was returned to Bedford Hills.

2) Physical Conditions at Bedford Hills and Fishkill/Matteawan:

Facts establishing the substantial inferiority of physical conditions in the Fishkill/Matteawan complex, in relation to those at Bedford Hills remain undisputed by the parties.

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3. Committment proceedings pursuant to Correction Law, §408 were initiated in Duchess County Court against these five women: Daisy Garcia, Margaret Leak, Diana Brown, Ramona Wilson, and Lizzie Geter. The proceedings were later withdrawn. (37a).

4. These transfers of April 3, 1975, followed on the heels of a pretrial conference with Judge Knapp at which plaintiffs advised him of their intention to file motion for summary judgment shortly.

conceded that in none of the cells in Building 13 or Matteawan was there hot running water in the individual cells (41a, 40a, 56a, 59a, 62a, 33a). By contrast, in one of the four buildings at Bedford Hills, where the appellees were formerly housed, there was hot running water in each cell. (73a). It is admitted that there were no toilets in the individual cells at Matteawan, or hooks for hanging clothes, while such facilities were provided in the cells at Building 13, and the general housing area at Bedford Hills. (43a, 50a, 56a, 59a, 62a, 33a). It is conceded that at Matteawan, in contrast with Bedford Hills, inmates could not control light or heat in the individual cells, nor could they open or close cell windows. (43a, 59a, 62a, 33a). Appellants present no evidence to contradict Doris Armstrong's statement that the windows of her cell at Matteawan were barred, and that she was not permitted to have her window open. (56a).

Appellees state that the food which was served to them in the day room at Matteawan was often cold, stale and "worse than tasteless," (49a, 56a, 58, 59a, 61a), and that on several occasions they saw cockroaches in the food or on the serving cart. (56a, 64a). At Matteawan, appellees only rarely were served fruits and vegetables (65a) and were not permitted to have second portions. (56a). By contrast, at Bedford Hills the food was edible and inmates were allowed to have second servings. (56a). Appellants present no contrary evidence.

The prisoners were permitted to spend only twenty minutes per day in the yard at Matteawan and the yard was infested with large

rats. (57a). At Bedford Hills inmates had a one-to-two hour recreation period in the yard. (57a). Again, the State presents no evidence to contradict these facts.

Further, appellees state that their cells at Matteawan were dingy, filthy and infested with mice and rats. (41a, 43a, 50a, 56a, 58a, 61a). The cells at Bedford Hills were, by comparison, clean and well kept. (56a). Not only do appellants fail to controvert these facts, but Commissioner Ward, on April 7, 1975, stated that the women's ward at Matteawan was "filthy, dirty, and unfit for human habitation." (46a).

Further, there is no dispute between the parties concerning the physical proximity of the women inmates' living quarters at Matteawan to the area housing mentally and emotionally disturbed patients. It is conceded that the women transferred to Matteawan were housed in a wing of the Matteawan State Hospital building. (69a). Exhibit"A," (65a), which is admitted to be a fair representation of the women's ward, (33a) shows that the female inmates were housed in an area directly adjacent to the patients' quarters.

Once thrust into the Matteawan State Hospital environment, Appellees were forced to come into close personal contact with mental patients on a regular basis. Doris Armstrong, Daisy Garcia and Carol Crooks state that male mental patients passed freely through the inmates' ward on the way to chapel. (43a, 56a, 62a). Carol Crooks states that "the men patients enter our ward at the

door marked "1," [Exhibit "A," (65a)] pass through the living area and leave by the stair marked "2." The male mental patients came through the ward unannounced, with no regard for whether or not the women weredressed or undressed. On several occasions the patients made sexual passes at women inmates. (43a, 56a, 62a). At the same time, it was necessary for the women inmates to pass through the mental patients' quarters in order to go to the movies and the commissary. (43a).

The frequent presence of physicians at Fishkill/Matteawan further supports theproposition that the womens' unit is more of a hospital than a prison facility. Margaret Leak testified that at Bedford Hills inmates must specially request medication, while at Matteawan a doctor is present almost all day to provide medication. (TR. 94, 95). In addition, Dr. Shafer testified that he regularly made rounds in the plaintiffs' living quarters, generally three to five times a week. (TR. 167, 218).

That the women inmates were perceived as patients by staff members at Matteawan is reflected in statements of Dr. Shafer and Ms. Ruane, the Officer in Charge at Matteawan. Dr. Shafer, in response to a question as to whether the inmates at Fishkill/ Matteawan were prisoners or mental patients, testified: "... if we really want to understand the situation we must fairly say that it is a gray area." (TR. 156), but admitted that he considered them as patients. Further, according to Doris Armstrong, Ms. Ruane, the Officer in Charge, said upon plaintiffs' transfer to Bedford Hills, that "we [plaintiffs] were never in Fishkill and

that we were actually Matteawan patients." (57a). Theresa Durante states, in the same vein, that Ms. Ruane remarked on April 9, 1975 as the women were preparing to return to Bedford Hills: "I might as well tell you this is Matteawan State Hospital." (64a). Finally it is not disputed that plaintiffs were subjected to forcible administration of Phenothaizine drugs, to promote effective custody, and not for treatment. (35a, 58a, 74a). All of these facts -- uncontroverted by any evidence adduced by defendants -- lead unescapably to the conclusion that appellees were treated as patients at the Matteawan State Hospital.

A further condition of appellees confinement at Matteawan was the repeated and unwarranted invasion of their privacy by male guards. Carol Crooks, Leslie Mason, Doris Armstrong, and Daisy Garcia state that male guards, in contravention of official regulations (49a) often came into the women's ward without warning, occasionally when the women were undressed. (41a, 49a, 56a, 62a) Carol Crooks states that Mr. Neil Breen, the program coordinator, often and unexpectedly looked into the window in her door without announcing himself, that he saw her in this manner when she was undressed, and that a guard on one occasion posted himself near the showers where he could watch her. (41a). Similarly, Doris Armstrong states that male guards were frequently on the women's ward, and on occasion looked into the window pane on her door without warning, and that a guard watched her while she was returning from the showers. (65a). Once again appellants present no facts by the individuals involved contradicting the evidence presented by appellees.

Further, appellees were forced to submit to strip searches, sometimes in the presence of male staff, as a condition of the exercise of their religious beliefs, and as a condition to family visits. Doris Armstrong states that the inmates were told they would have to submit to a search if they wanted to go to Muslim services. (54a). Pursuant to this policy, she was stripped and searched by a woman in fromt of Mr. Card, and subjected to a similar procedure each week on the way to services. (54a). Carol Crooks also states that, unlike women of other religions, she was forced to submit to a search as a condition of attendance at Muslim services. (43a). Again, defendants do not present any contradictory facts.

3) The Adverse Consequences of The Transfer:

As a result of the transfer to Matteawan, appellees were deprived of the vastly superior educational and rehabilitative opportunities available at Bedford Hills which include a wide variety of academic courses, ranging from the elementary school to the college level (34a, 44a), as well as vocational and occupational training. (35a, 57a, 62a). By contrast, the Matteawan program was limited to woodworking, auto shop, knitting, crocheting and academic classes up to the sixth grade level, conducted in the corridor of the womens' wing by a part-time tutor, and frequently interrupted by passers-by. (42a, 50a).

Appellants admit that the list set forth below describes the educational programs of the two institutions:

BEDFORD HILLS PROGRAMS:

Academic Education Program: Subjects Taught:

H.S. Equivalency Preparation

Correctness & Effectiveness of Expression

Interpretation of Reading Materials in the Social Studies Science

Interpretation of Reading Materials in Literature

General Math

Office Practice

Shorthand

Business English

Remedial Reading - A

Remedial Reading - B

Remedial Reading - A & B

Business Arithmatic

Data Recording

Typewriting

Communication Skills

Steno-Record Keeping

English

Special Reading - II

H.S. Equivalency Math

A - Science
C - Science
C - Math

Learning Lab -Elem.

Social Studies

English - C

English Remedial - A & B

Science - B

English - B

English Spoc. I & II

Bookkeeping

Business Law

Math - B

Math - C

Math Remedial

Math - A

Vocational:

Arts and Crafts

Library

Dance

Photography

Occupational Education - Vocational:

Beauty Culture

Laundry

Sewing

Food Service

MATTEAWAN PROGRAMS

a) Auto Shop

b) Woodworking

c) Occupational therapy (consisting of knitting and crocheting).

In the face of this clear disparity appellants contention that appellees were transferred because they were "slow learners," (Defendants' Brief p. 5) is astonishing. Prior to their removal from Bedford Hills, each of the women, except Carol Crooks and Leslie Mason, were required to take written examinations, the result of which were not revealed to them. (32a). They were told that they were being transferred to Matteawan because they had poor reading abilities and were "slow learners." (42a, 53a). Yet, it is conceded by the State that at Bedford Hills appellees had the opportunity to take several courses in remedial reading, remedial English, and remedial math, and that the transfer to Matteawan deprived them totally of any access to such specialized programs.

Further, as a result of the transfers and in violation of Department Regulations, appellees were subjected to a reduction in pay grade. The following schedule which Leslie Mason's affidavit

sets forth, and which appellants fail to contravert with specific facts, represents pay reductions resulting from the transfers:

Name	Bedford Hills	Matteawan State Hosp.
1. Doris Armstrong	.55	.25
2. Theresa Durante	.55	.25
3. Maria Torres	1.15	.25
4. Barbara Lee	.75	.35
5. Carol Crooks	.85	0.00
6. Daisy Garcia	.55	.25
7. Leslie Mason	1.15	.35
8. Ethel Crawford	1.15	.35
9. Gloria Jones	.70	.25
10. Margaret Leak	.75	.35
11. Linda Jones	1.15	.35
12. Diana Brown	.40	.25
13. Carrie Wannamaker	1.15	.25
14. Bertha Wack	.75	.35
15. Rebecca Truesdale	.90	.35
16. Margo Albergottie	.45	.35
17. Lorraine Geston	.45	.35
18. Lizzie Geter	.45	.25

Further, as a direct consequence of the transfer from Bedford Hills to Matteawan, Daisy Garcia's chance for parole was reduced. In he affidavit she states that her parole officer informed her in June, 1975, that she "could expect five more months in prison because [she] was sent to Fishkill." (62a).

The Transfer of Carol Crooks and Leslie Mason:

The events which culminated in the transfer of Carol Crooks to Fishkill/Matteawan are uncontroverted. On August 28, 1974, Lieutenant Waterman asked Carol Crooks to go to segregation. (38a). Since no written notice of charges against her were presented, she refused to comply. (38a - 39a). At about 10:20 of the same day, six male guards entered her cell, tied her hand and foot, beat her and physically carried her to segregation. (39a). She was left there without clothing or blankets, (40a), and remained in segregation until September 1, 1974. During this time, she was afforded no notice of any charges against her or hearing on the reasons for being in segregation. (36a). At about 1:30 p.m. on September 1, 1974, Carol Crooks was taken from her cell by several male guards on the pretext that she had a visitor. (40a). Instead, she was taken to Fishkill and there was kept locked in her cell. She remained there until September 6, 1974. For the first week at Fishkill, she had no reading or writing materials, and no clothes or shoes except those she was wearing. (41a). Thirteen days after her initial detention in solitary confinement, she was finally served with notice of a Superintendents' Proceeding to be held on September 9, 1974, for charges originating at Bedford Hills. (41a).

Similarly, the facts surrounding the transfer of Leslie Mason are not in dispute. Leslie Mason is a transsexual who has been surgically changed from male to female. (48a). While she was at Bedford Hills, she was housed in the Special Housing Unit, but was

permitted to participate fully in all available programs. (48a). On or about September 27, 1974, she was transferred to Building 13, in the Fishkill Correctional Facility, without any notice or opportunity to be heard. (48a). In response to her letter to Commissioner Preiser, requesting reasons for her transfer, she received the following explanation: "The transfer was initiated due to the difficulty you experienced in adjusting to the Bedford Hills milieu." (Exhibit "C," 67a).

The foregoing undisputed facts compel the conclusion that the transfers of Carol Crooks and Leslie Mason were intended as punishment. Defendants' reference to Carol Crooks as "troublesome"[5] (Defendants' Brief at 5), and to Leslie Mason's "difficulty in adjustment" wholly support that conclusion. It is equally clear that the transfers of these two plaintiffs, like the transfers of each of the other plaintiffs, entailed such substantial deprivations as to be inherently punitive.

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5. Under no circumstances does Carol Crooks concede that she is "troublesome." (See Appellants' Brief, P. 5 note).

ARGUMENT

POINT I

THE TRANSFER OF APPELLEES OR THE CLASS UNDER THE CONDITIONS PROVEN CONSTITUTE SUCH A MAJOR CHANGE IN THE CONDITIONS OF THEIR CONFINEMENT SO AS TO REQUIRE THE PROTECTION OF THE DUE PROCESS CLAUSE.

> While lawful imprisonment necessarily makes unavailable many rights and privileges of the oridinary citizen, it is today clear that an iron curtain is not drawn between the prisons of this country and the Constitution. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Hearings of varying degrees of formality have been required in cases involving revocation of parole, Morrissey v. Brewer, 408 U.S. 471 (1972), revocation of probation, Gagnon v. Scarpelli, 411 U.S. 778 (1973), certain prison disciplinary proceedings, see, e.g., Wolff v. McDonnell, supra, and the involuntary transfer of a prisoner to an institution for the criminally insane, United States Ex. Rel., Schuster v. Herold, 410 F. 2d. (1971 (2nd Cir.), cert, denied, 396 U.S. 847 (1969). Cardaropoli v. Norton, Docket No. 75-2005 (2nd Cir., Sept. 29 1975), sl. op. 76.

Of greater significance is that this Court in U.S. Ex. Rel. Haymes v. Montanye, supra and Newkirk v. Butler, supra, the First Circuit in Fano v. Meachum, 520 F. 2d 374 (1st Cir., 1975) and Gomez v. Travisono, 510 F. 2d 537 (1st Cir., 1974), the Sixth Circuit in Ault v. Holmes, 506 F. 2d 288 (6th Cir., 1974) and Stone v. Egeler, 506 F. 2d 287 (6th Cir., 1974), and the Ninth Circuit in Fauerak v. McGinnis, 493 F. 2d 468 (9th Cir., 1974) have held that inter-prison transfers may work such a substantial

change in the conditions of confinement as to require procedural due process.[6] Underlying these holdings is the recognition that prisoners do retain substantial rights protected by the Fourteenth Amendment that may result in grievous loss when they are involuntarily transferred to institutions where conditions are "harsher or substantially different" from those at the sending institution. Haymes, supra, 505 F. 2d at 981.[7]

In evaluating the loss suffered by a prisoner when she is involuntarily transferred we must penetrate the labeled distinction between "punitive" or "administrative" used by the State. As this Court taught us in Newkirk, supra, and Haymes, supra, we must look at the actual consequences of the transfer to determine whether it was punitive in effect. In his dissent in Fano, supra, 520 F. 2d at 382, Judge Campbell noted that the distinction between "punitive" and "administrative" transfers can only invite confusion and litigation over the real as opposed to the ostensible motive for

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6. Several district courts have also reached the same conclusion. See, e.g., Walker v. Hughes, 386 F. Supp. 32 (E.D., Mich., 1974), Robbins v. Kleindinst, 383 F. Supp. 238 (D.D.C., 1974), Clonce v. Richardson, 379 F. Supp. 338 (W.D., Mo. 1974), Rosenberg v. Preiser, 388 F. Supp. 639 (S.D.N.Y., 1975), Tai v. Thompson, 387 F. Supp. 912 (D., Hawaii, 1975), Daigle v. Hall, 387 F. Supp. 652 (D., Mass., 1975).

7. While Gomez and Ault involved interstate transfers, Fano, Newkirk and Haymes are clear that the same considerations are equally applicable to intra-state transfers. For instance, in Fano, 520 F. 2d at 378 the First Circuit said: (Continued).

Footnote Continued.

> The consequences of intrastate and interstate transfers are for the most part indistinguishable. In either case "disadvantages" stem from the breaking off of established programs, both educational and rehabilitative, and orientation to a new setting, programs, rules and companions. "Gomez" as a possibility that a transferee may be considered an identified troublemaker and treated unfavorably as a result, has been stipulated to in this case.

Other relevant similarities include adverse parole consequences and a tendency to consider the transferees as trouble makers. As discussed infra, these adverse consequences alone are sufficient to trigger the due process clause.

transfer. As a District Court said in Kessler v. Culp, 372 F. Supp. 76, 77 (D., Ore., 1973):

> Affixing a label to determine the outcome may well also mask or conceal the interests involved. An identification of those interests is vital if they are to be protected from grievous harm or loss.

A. The Nature of the Protected Right:

In Wolff v. McDonnell, supra, the Supreme Court found that loss of good time is a substantial right within the Fourteenth Amendment concept of liberty, 418 U.S. at 557, as is any "major change in the conditions of confinement" like placement in solitary confinement, 418 U.S. 571-72 N. 19. The test is whether the interest affected "has real substance" Id. at 557. In the context of inter-prison transfers, when analyzing the prisoners' liberty interests, the inquiry must focus on whether the detrimental effects of the transfer are serious enough to constitute a grievous loss. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951). See cases cited post at pp. 17. In Addition to the increased hardship imposed by transfers further away from family and friends, this Court, in Haymes, detailed the grievous loss flowing from arbitrary transfers:

> He also was removed from the friends he had made among the inmates at Attica and was forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility, 7 N.Y.C.R.R., Part 260; personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment, see Hoitt v. Vitek, 361 F. Supp. 1238, 1249 D.N.H. 1973); and educational and rehabilitative programs can be interrupted. Moreover, the fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom, 505 F. 2d at 982.

While arguably due process consideration may not apply to minor deprivations like loss of an evening's television privileges, Wolff, supra, Cardaropoli, supra, this Court in Newkirk and Haymes recognize that the factors specified above result in a significant modification of the overall conditions of confinement.[8] The record bears this out. The State does not deny or rebut appellees' affidavits concerning the deprivations alleged, nor does the Commissioner of Correctional Services deny that he declared the

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8. It does not help the State to disparage the precedential value of Newkirk and Haymes. In both cases the same argument that prisoners have no liberty or property interests at stake when they are transferred to a different institution, was made, (Newkirk, Appellants' Brief, pp. 31-34; Haymes, Appellees' Brief, pp. 6-7), and rejected. Assuming arguendo, that Newkirk is not binding, it is certainly persuasive, particularly when the record, in the instant case, reveals harm even more egregious than that suffered by Newkirk. (Continued).

Womens Unit "not fit for human habitation" (46a). The undisputed evidence shows that in spite of directives to the contrary, all the transferees were reduced in pay grade (51a), and that men, both mental patients and staff, circulated on the womens' housing floor with impunity (43a, 44a, 49a, 56a). The psychiatrist at Fishkill admitted that women were regarded as patients. (TR. Hearings, Feb. 18 - 20, 1975, pp. 166), and were housed in a wing of Matteawan State Hospital. Significantly, the State admits that medication was forcibly administered to women for purposes other than treatment.

Moreover, the State does not deny that Margaret Leak was denied parole for thirteen months, based in part on the transfer to Fishkill (59a - 60a). Likewise, it is undisputed that Daisy Garcia was told that her parole chances would be harmed because she was sent to Fishkill/Matteawan. (62a).

The State's claim that most of the women were transferred because of unarticulated educational deficiencies is all the more incredible when we compare the full range of educational rehabilitative programs which the State admits is available at Bedford Hills.

Footnote Continued.

8. Similarly plaintiffs show, on the record, substantially greater deprivations than those inflicted on Rodney Haymes. Moreover, although Haymes is now pending in the Supreme Court, the case is still the law in this Circuit and it would be presumptious to guess at the Court's decision.

to the total lack of educational facilities at Fishkill/Matteawan. (See Post pp. 13). It was a deprivation of these programs that led this Court in Cardaropoli, supra, to hold that when a change in a prisoner's classification hinders or precludes participation in important rehabilitative programs, an administrative hearing is required. Sl. Op. 82, 83.

The prisoners interests have been recognized by penologists even before the courts articulated them as legal principles. The National Advisory Commission on Criminal Justice Standards and Goals, Corrections (1973), Standard 2.13 Procedures for Non-Disciplinary Changes of Status recommended that correctional agencies promulgate written rules and procedures to govern changes in offender status, "including classification, transfer, and major changes or decisions on participation in... programs..." (Emphasis added). The Commission's commentary states that "decisions of this kind can have a critical effect on the offender's degree of liberty, access to correctional services, basic conditions of existence... and eligibility for release." Id. at pp. 54 - 55.[9]

Moreover, involuntary transfers are historically used to remove "trouble makers" from a prison. Gomez v. Travisono, supra, Haymes, supra. The immediate inferences of the transfers, then, are

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9. In Ault v. Holmes, supra, these conclusions were supported by the testimony and affidavits of Donald Goff and Paul Keve, both recognized penological experts. See Brief for Appellees at pp. 12, 14.

negative, and the fact of transfer appears on the prisoner's institutional record. Penogolists recognize the strong influence that institutional records have on the parole board, see, e.g., American Correctional Association Manual of Correctional Standards, (3rd Ed., 1966) 413, and thus a prisoner is immediately prejudiced on her parole application by the very fact of transfer.

The State's argument that there is no statutory right to be kept at a particular institution (Appellants' Brief, p. 11), is specious.[10] New York's Correction Law establishes the right of a prisoner to have access to appropriate rehabilitative educational and vocational programs. Correction Law, Section 70 (2) provides that prisons shall provide "programs of treatment" for prisoners with the objective of assisting sentenced persons to live as law-abiding citizens." See also, Correction Law, Section 137(1) and (5). This aim is to be accomplished with due regard to, among other things, "the right to every person... to receive humane treatment." Correction Law, Section 70(2). (This provision assumes monumental importance in light of the Commissioner's pronouncement that the womens unit at Fishkill/Matteawan is unfit for human habitation). In furtherance of these goals, Correction Law, Sec. 136

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10. Neither may the State rely on Correction Law, Section 801(2), which has been repealed and not replaced. (Appellants' Brief, p. 9). Although there is no legislative history discussing the repeal, it must be presumed that it was done for a specific purpose, and not frivolously.

directs educational programs to be established that, "with emphasis on individual inmate needs," will "further the process of socialization and rehabilitation" by providing facilities that will give inmates "the skill and knowledge which will give them a reasonable chance to maintain themselves and their dependents through honest labor." In addition, Correction Law, Section 200 (2) charges the Commissioner with the responsibility for establishing in the State's prisons "a system of educational vocational and industrial training programs" which will "facilitate an inmate's eventual reintergration into society." Having thus statutorily embodied the right to educational and vocational programs, the State cannot, as it has done here, deprive appellees of the right to participate without affording them adequate due process safeguards. Goss v. Lopez, U.S. , 95 S. Ct. 729 (1975), Wolff v. McDonnell, supra, 418 U.S. at 557, Morrissey v. Brewer, 408 U.S. 471 (1972), Goldberg v. Kelley, 397 U.S. 254, 262 (1970).

For appellants to claim in the face of the New York's own statutes that prisoners have no interest in access to the mandated programs is in fact, to resurrect the "right-privilege" distinction, (which appellants concede is thoroughly discredited, Appellants Brief, p. 11), in every context which this Court so recently and finally laid it to rest. Cardaropoli v. Norton, supra, Sl. Op. 82, 83 n. 11.

The State has created a right which, as the Supreme Court indicated in Wolff, supra and Goss, supra, contains elements of both liberty and property. To determine whether those elements are embraced by the Fourteenth Amendment we must look not to the weight but to the nature of the interest at stake. Morrissey v. Brewer, supra. We may then examine whether the prisoner is "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Committee v. Mcgrath, supra. Applying this analysis, most courts have found that an arbitrary classification which may deprive a prisoner of participation in important statutorily created rehabilitative programs is a major alteration in the conditions of confinement, is much more serious than mere loss of privilege, and is indeed a grievous loss of the kind usually protected by the due process clause. Wolff, supra, Cardaropoli, supra.

Assuming, without conceding, that New York was under no constitutional obligation to establish educational and vocational programs for its prisoners, once Correction Law, Sections 136 and 137, were enacted, the prisoners had every reasonable expectation that they wouldnot be deprived of the opportunity to participate. The grievous loss flowing from the classification of the transferees in this case as "slow learners" or educationally deficient, and placement in an institution admitted to be unfit to live in which is totally devoid of effective educational programs, has been well documented in this case (Post, pp. 11 - 14) and in the cases cited throughout this brief. The State, having created the right may not

inflict the harm without employing fundamentally fair procedures to ensure that the right is not arbitrarily abrograted. Goss v. Lopez, supra, 95 S. Ct. at 936, Cardaropoli, supra, Sl. Op. 83.

B. The State Interest:

It is true that in the context of prisons, the interests of the prisoner in securing her constitutional rights must be balanced against the State interests in administration and operation of its prisons. Wolff, supra, 418 U.S. at 555. However, the State's interest in avoiding summary, arbitrary transfers is minimal at best. In fact, neither here nor in the District Court have appellants argued that they have any compelling interest that would justify not holding hearings. To the contrary, in certain respects, the prisoners interests coincide with those of the State. For instance, the State has announced its interest in the reintegration of prisoners in society through educational and vocational training programs. Correction Law, Sections 70, 136, 137 and 200. It serves no one's interest to place those persons who that State has decided are most in need of educational programs in an institution totally devoid of those programs.

Furthermore, the State cannot claim that hearings will place a burden on the prison's administrative staff. First, transfers are not part of the prison's daily routine and do not normally involve large numbers of inmates at one time. Second, there are existing mechanisms for disciplinary and classification hearings that can be adapted to this purpose. The interests of the prisoners in living conditions, parole, and their own rehabilitation are

therefore so great when compared to any contrary state interests that they are constitutionally entitled to procedural safeguards before being involuntarily transferred to an institution where they will suffer the proven loss.

C. The Process That is Due:

It is well settled that whenever the due process clause imposes procedural requirements, the basic elements are notice, an opportunity to be heard and a statement of reasons. Wolff, supra, Morrissey v. Brewer, supra, Goldberg v. Kelly, supra, Sostre v. McGinnis, 442 F. 2d 178, 198 (2nd Cir., 1971). The adverse consequences flowing from involuntary transfers including, among others, those disucssed above, led the National Advisory Commission in Standard 2.13, to declare that when there are "substantially adverse changes in degree, type, location or level of custody" (emphasis supplied), an administrative hearing should be conducted involving notice, an opportunity to be heard, and a written statement of reasons for action taken. The procedures mandated in the post Wolff transfer cases, Fano v. Meachum, supra, Gomez v. Travisono, supra, Ault v. Holmes, supra and others, embody those elememts and should be followed in all cases where members of the class are subject to the deprivations discussed. Moreover, where there is a blatantly punitive animus behind the transfer, as in the cases of Carol Crooks, (see Post, pp. 15) and Leslie Mason, (see Post, pp.16) the full panoply of protections guarenteed by Wolff must be provided. Gomez, supra, 510 F. 2d at 539.

POINT II

SUMMARY JUDGMENT WAS PROPERLY GRANTED BY THE DISTRICT COURT BECAUSE EXAMINATION OF PLAINTIFFS' PROOFS, COUPLED WITH DEFENDANTS' ADMISSIONS LEAVE NO MATERIAL FACTS IN QUESTION.

A. There Are No Material Facts at Issue:

The essence of the procedure for summary judgment is to provide the courts with the means to avoid expensive and time consuming litigation when there are no material factual issues in dispute between the opposing parties. Mintz v. Mathers Fund, Inc., 463 F.2d 495. (7th Cir., 1972); Bland v. Norfolk & Southern R.R. Co, 406 F.2d 863, 866 (4th Cir., 1969). On a motion for summary judgment the court "must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom the summary judgment is sought." Heyman v. Commerce & Industry Insurance Co., F.2d , (Dct. No. 75-7230) (2nd Cir., Oct. 24, 1975). However, there can be no ambiguities where, as here, appellants have conceded material facts providing a sufficient basis upon which the trial court could properly grant a summary judgment.

The material facts admitted by the appellants are significant. They concede in their Brief, "...that in no case were the plaintiffs afforded any written notice, statement of reasons, hearing, written decision and/or evidence relied upon (by defendants in reaching the decision to transfer the plaintiffs)." (Appellants' Brief, at p. 5).

Appellants further admit, either explicitly or implicitly through their objections to plaintiffs' 9(g) Statement, that the living conditions of the women transferred to Fishkill/Matteawan had been altered considerably to their detriment.[11] They concede that the transfers substantially deprived appellees of educational and rehabilitative opportunities. (71a). No objection is made to plaintiffs' delineation of the sparse educational/vocational programs available at Matteawan. It is conceded that there were no sinks or toilets in the individual cells at Matteawan. (70a). The transfers from Bedford Hills to Fishkill/Matteawan manifestly involved more that "minor amenities" and in fact, touched on some of the most important aspects of plaintiffs' lives and well being. As the Court in Palmigiano v. Baxter, 498 F.2d 1280, 1284 (1st Cir., 1973) noted:

> "In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations and some modicum of privacy, it is likely that any marked changes of status which forecloses such liberties will be percieved and felt as grievous loss."

The core of this argument then, is that the losses occasioned by these transfers and admitted by appellants are the material issues of this suit. In that case:

> "Appellate courts should not look the other way to ignore the existence of genuine issues of material facts, but neither should they strain to find the existence of such genuine issues

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11. Pertinent portion of Rule 9(g) provides: "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

where none exist." Mintz v. Mathers Fund, supra, 463 F.2d at 498.

In keeping with the underlying purpose of Rule 56, summary judgment was properly granted to appellees because the appellants admit or do not controvert, the material facts proven by appellees.

B. Appellants Have Not Come Forward With Evidentiary Matter Sufficient to Defeat a Motion for Summary Judgment:

Fed. R. Civ. Proc. 56 (e) provides in pertenent part:

> "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. (Emphasis added).

Rule 56 was amended in 1963, as set out above, to insure that the substance of the summary judgment procedure was not impaired through reliance on mere denials by parties opposing summary judgments. The Advisory Committee on the 1963 Amendment stated that the mission of the Amendment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. Fed. R. Civ. P. 56, Advisory Committee Notes. The Supreme Court confirmed the purpose of the amendment in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968); rehearing den. 393 U.S. 901 (1968). See also Beal v. Lindsay, 468 F.2d 287 (2nd Cir., 1972); Dressler v. M.V. Sandpiper, 311 F.2d 130 (2nd Cir., 1964). The Second Circuit stated in Beal, supra at p. 291 that:

> "When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts."

In opposition to appellees motion for summary judgment, appellants did not come forward with factual material but merely relied on their objections to plaintiffs' 9(g) statement. Those objections are similar in form and substance to an asnwer to a complaint.[12] The objections, without specific facts established by testimony or affidavit are insufficient as opposition to appellants motion for summary judgment which is supported by detailed affidavits. (38a, 64a).

In support of appellants objections to the 9(g) statement, there are two vague and conclusory affidavits. One is from Ms. Janice Warne, then Superintendent of Bedford Hills Correctional Facility. She states that hot water is only available in one out of four housing units in Bedford Hills and further, that the objections posed insofar as they concern the facilities and operations at Bedford Hills, are true and accurate. (73a). Standing alone Ms. Warne's statement is not even pertinent. The Court must look to the totality of the circumstances of the transfer

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Footnote Continued.

12. This becomes apparent if we merely substitute the word "deny" for the word "object" where appearing. For instance, Paragraphs Eight and Ninth read:

> Eighth: Admit Paragraph 17, but object to so much of that paragraph as alleges that plaintiff or those transferred to Fishkill participated in all or substantially all of those courses." (Continued).

and the conditions of confinement. In that context the single fact of presence or absence of hot water is insignificant.

The second affidavit is provided by the Superintendent of Fishkill Correctional Facility. Mr. Vito Ternullo states that the defendants' objections to plaintiffs' 9(g) statement are true, insofar as they concern the operations, facilities and policies at the Female Unit of Fishkill Correctional Facility. (74a). His affidavit contains no facts at all, but simply verifies the defendants' objections.

These two affidavits offered by appellants do not contain specific facts as required by rule 56. They do not provide the court with the means to assess the proofs of specific allegations made by plaintiffs' affidavits. For instance, Paragraphs 20, 21 and 22, of the 9 (g) statement allege that the pay grades were inferior at Matteawan, that there is insufficient time to use the law library, and that women are strip-searched in the presence of men guards. (35a). These allegations are supported by the affidavits of Leslie Mason, Carol Crooks and Doris Armstrong. Ms. Leslie Mason detailed the pay losses incurred by all of the plaintiffs as a result of their transfer from Bedford Hills, (50a, 51a). Ms. Mason's earnings were reduced from $1.15 per day while at Bedford Hills, to $.60 per day at Fishkill, and finally to $.35 per day for mopping floors at Matteawan. (51a).

Footnote continued.
12.
Ninth: Object to all of Paragraph 19 of Plaintiffs' 9(g) statement." (R 71a).

Ms. Carol Crooks states under oath that the use of the law library was limited to thirty-five minutes per day, although the women were scheduled to use the library for fifty minutes per day. (46a). Ms. Doris Armstrong alleges in her sworn affidavit that she was stripped and searched by Ms. Cahart and Ms. Barlo in the presence of Mr. Card, who is the Director of Programs. However, the appellants set forth no facts in opposition, but reply only to the latter 9(g) statement as follows:

> Object to all of Paragraphs 20, 21 and 22 of plaintiffs' 9(g) Statement. (71a).

Appellants' objections shed no light whatsoever on the factual basis for their objections. Doris Armstrong's affidavit provides appellants with the names of three employees of the institution who were capable of confirming or denying whether the events she testified to occured precisely as she has described them. Similarly, neither the officer in charge of the law library, nor the employee responsible for appellees pay submitted evidence to rebut Carol Crooks' or Leslie Mason's statements. Therefore, the District Court, never having been furnished with specific facts establishing that there was a genuine issue for trial, properly granted plaintiffs' motion for summary judgment. Fed. R. Civ. P. 56(e), Beal v. Lindsay, supra, Dressler v. M.V. Sandpiper, supra.

Appellants reliance on Arnstein v. Porter, 154 F.2d 464 (2nd Cir., 1946) and other early cases is misplaced. Most recently the Second Circuit stated in Heyman v. Commerce & Industry Insurance Co., supra, Sl. Op.

> "Although for a period of time this Circuit was reluctant to approve summary judgment in any but the most extraordinary circumstances, see, e.g., Arnstein v. Porter, 154 F.2d 464, 468 (2nd Cir., 1946), that trend has long been jettisoned in favor of an approach more in keeping with the spirit of Rule 56, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90 (1968); Dressler v. M.V. Sandpiper, 331 F.2d 130 (2nd Cir., 1964); Beal v. Lindsay, 468 F.2d 287, 291 (2nd Cir., 1972)."

Appellants have not come forward with the required quantum of proof, consequently the grant of summary judgment was in keeping with the spirit and purpose of the rule.

CONCLUSION

It is fundamental penological theory that one aim of imprisonment is to enable prisoners to re-enter society with a respect for its laws. In a long series of decisions culminating in Wolff v. McDonnell, supra, the courts implicitly have acknowledged that arbitrary actions by prison administrators are antithetical to that objective. Because the conditions of their confinement are central to acheiving that end, the courts recognize that prisoners have substantial interests in those conditions, and require due process safeguards whenever there is a substantial modification, e.g., disciplinary procedures and interprison transfers.

To claim that once a prisoner is sentenced she has no interest in the place of her confinement, especially when she is transferred to an admittedly uninhabitable institution where statutorily mandated programs are unavailable, is to argue the medieval concept

that prisoners are mere chattels of the State. This is contrary to sound penological theory as well as existing law. As the Seventh Circuit said in U.S. Ex. Rel Miller v. Twomey, 479 F.2d 701, 712 (7th Cir., 1973):

> As we noted in Morales v. Schmidt, the the view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which is criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. "Liberty" and "custody" are not mutually exclusive concepts.

Appellees have shown that they have been deprived of substantial liberty even while in custody. Accordingly, the order appealed from should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on November 26, 1975 the within Appellees Brief was served on the Attorney General of the State of New York by mailing a copy to his offices at No. 2 World Trade Center, New York, N.Y.

Attorney for Plaintiff- appellees